IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

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SUPREME COURT, U.S.

NO: 78-5508

STEVEN JEROME DREW,
PETITIONER

VERSUS

STATE OF LOUISIANA,
RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATED JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

STATE'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI FILED
BY STEVEN JEROME DREW

MAY IT PLEASE THE COURT:

Petitioner, Steven Jerome Drew, had been indicted by the grand jury for aggravated rape committed on October 18, 1976, in violation of LSA-R.S. 14:42 (1975). After trial by jury, he was found guilty as charged. The case is reported at State vs. Drew, 360 So.2d 500 (1978). (See Appendix No. 1).

STATEMENT OF FACTS

Victim, a young housewife, mother of three small children, Mrs. Bonnie Sue Sibley, had stopped in the Eckerd Drug Store in the 1900 block of North Market Street, Shreveport, Louisiana, around 9:00 p.m. When she returned to her car, Petitioner Steven Drew produced a pistol and demanded she move over. He got into her automobile. He signaled an accomplice in another car to follow them. After a short drive, she was struck on the head with a flashlight, forced to lie on the ground (on the street surface). Then a cloth was thrown over her head. The two men had intercourse with her; Petitioner Steven Drew then took his pistol and inserted it into the victim's vagina. Finally, after surviving threats that defendant and accomplice were going to shoot her, they locked her in the trunk of her car. Her three children (a babe in arms) and two others to age five, were in the back seat all the while. Petitioner Steven Drew was arrested later, having tried to sell items stolen from the victim. Petitioner Steven Drew was identified by victim at a line-up.

It is the position of the Respondent, the State of Louisiana, that the instant case fails to present issues worthy of this Honorable Court's review in light of the criteria established in Rule 19 of the Revised Rules of the Supreme Court of the United States. The Supreme Court of Louisiana has rendered judgment on this matter and all the issues raised in petitioner's Application stating reasons with sufficient support entirely on adequate and independent state grounds.

LAW AND ARGUMENT

The Petitioner, Steven Drew, has set forth what purports to be eleven (unnumbered) issues on pages 7, 8 and 9 of his petition.

STATE'S RESPONSE TO ISSUE NO. 1
SUBMITS THE STATUTES ARE CONSTITUTIONAL
AND NOT VAGUE OR AMBIGUOUS

Petitioner erroneously asserts vagueness and ambiguity by analogizing the aggravated rape statute with that of the lesser included crime of forcible rape. Notwithstanding some similarity in language, the lesser included crime of forcible rape (14:43.1) is clearly a different crime specifically stating the degree of resistance by the victim being the essential distinguishing element. State vs. Fletcher, 341 So.2d 340 (1976). The jury was given instructions on both crimes, in addition to simple rape and a jury charge as to attempt. If the jury had found the victim's resistance less than "to the utmost, but...overcome by force," or that the victim was not "prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution," then it could have found a violation of the lesser included crime of forcible rape which simply requires the victim's reasonable belief resisting would have been useless. Here, however, in the instant case, all the elements of aggravation were present and submitted to the jury for consideration; a gun held on the victim at all times, verbal threats, physical force and violence and THE BARREL OF THE GUN INSERTED IN HER VAGINA.

In any event, inasmuch as the jury was also presented the lesser-included crime of forcible rape for consideration as

a responsive verdict (in addition to attempted forcible rape) after being read the pertinent statutes (I, R-55,56) there was no prejudice to the defendant. State vs. Finley, 337 So.2d 1151 (1976); State vs. Smith, 340 So.2d 247 at 249 (1976).

As to petitioner's "line by line" analysis of aggravated rape and forcible rape, he does not in fact go line by line but somewhere along the lines, paraphrases, adds and deletes for his own reasons. Despite this misrepresentation to the Court, inadvertent though it may be, the Court is directed to comparable situations in the homicide statutes, where only the degree of violence or intent is the distinguishing difference and which factor is for the jury to decide in returning a verdict under certain responsive alternatives.

STATE'S RESPONSE TO ISSUES
NOS. 2,3,4, RE: VOIR DIRE

The answer of Mr. Rutledge, in his status as prospective juror on voir dire, cannot be held attributable to the State. Defense counsel would have voir dire responses raised to the level of State vs. Foss, 310 So.2d 572 (1975) even though the juror had not yet been selected. The whole purpose of the question, a typical voir dire query, is to screen out such potential prejudicial thinking as Mr. Rutledge revealed.

In any event, the trial court admonished the jury to disregard Mr. Rutledge's remark (Vol. II, Tr. p. 145) and granted defense counsel's challenge for cause. State vs. Jones, 282 So. 2d 422 at 430 (1973). No prejudice was suffered by the defendant.

There is no question as to the validity of the Assistant District Attorney's question. State vs. Drumgo, 283 So.2d 463 at 466 (1973); LSA-C.Cr.P. Art. 797(2). See also, Marr, The Criminal Jurisprudence of Louisiana, 2d Ed. pp. 689-690, 691 (1923):

> "The object of examining a juror on his voir dire is to ascertain the state of his mind, in order to find out whether he stands indifferent between the state and the prisoner. He is considered indifferent when he has no bias for or against the prisoner; when he has not formed or expressed an opinion as to the guilt or innocence of the prisoner, after having heard the narrative of the witnesses, and finally, when he entertains no conscientious scruples that would prevent him from carrying the law into effect.
>
> "The object of the law is to select impartial jurors to try the issue between the state and the defendant, and to ascertain that impartiality considerable latitude is allowed both to the prosecution and to the defense in examinations on the voir dire."

See also, State vs. Evans, 192 So.2d 103 at 107 (1966).

Petitioner's Witherspoon argument has been rendered moot by virtue of the jury's recommendation and judge's imposition of a life sentence. The sanction of Witherspoon vs. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), is limited to vacating the death sentence. That identical result is accomplished in the case at bar. Compare State vs. Smith, 340 So.2d 247 at 250-251 (1976). See also, LSA-C.Cr.P. Art. 798 (2); State vs. Volson, 352 So.2d 1293 (1977).

The voir dire examinations of prospective jurors Stacks, Peeples, and Braddock is found in Vol. III, starting at page 14 (also numbered Vol. IV within the transcript).

Mr. Peeples clearly answered, indicating his impartiality, all questions regarding possible prejudice to the judge's satisfaction (Vol. III, Tr. p. 53).

Mr. Stacks was challenged on grounds of "ear condition" whereby he required "washing it out." But after extensive examination, the trial judge found no basis for challenge for cause.

Mr. Braddock was originally challenged for racial bias which defense counsel attributed to juror's response, "I hope not" when queried about having racial prejudice. However the

trial court felt he was sufficiently satisfied with juror's impartiality when he finally said he would not be prejudiced. See Vol. III, Tr. p. 42.

> "MR. BEADLES: I see. Mr. Braddock, I believe when Mr. Johnson was examining you with reference to the difference in race, your answer was the same as that of Mr. Stacks. That is, you would hope that a difference in race would not effect--
>
> "JUROR BRADDOCK: Well, I think you have to be honest and truthful as you possibly can. I would consider the evidence in the case and judge as fairly -- And I know that everyone of us has a subconscious mind that we can't speak for. That's all I was trying to get across to you.
>
> "MR. BEADLES: All right, sir. In that sub-conscious -- This may not even be possible -- But aside from psychology or psychiatry or whatever, do you harbor any prejudices for blacks?
>
> "JUROR BRADDOCK: No, I don't.
>
> "MR. BEADLES: Is there anything now -- Appreciate your answering truthfully. Is there anything about the difference in races that would in any way in and of itself make a rape more aggravating, cruel or onerous?
>
> "JUROR BRADDOCK: I think it's a heinous crime any way it happens. It wouldn't make any difference whether it was black, white, red or yellow as far as I'm concerned.
>
> "MR. BEADLES: I see. Do you accept the presumption of innocence that the defendant is entitled to?
>
> "JUROR BRADDOCK: I do."

Louisiana, has repeatedly held that the trial judge is vested with broad discretion in ruling on challenges for cause, and only where it appears, upon review of the voir dire examination as a whole, that the judge's exercise of that discretion has been arbitrary or unreasonable, resulting in prejudice to the accused, will this Court reverse the ruling of the trial judge. State vs. Weathers, 320 So.2d 895 (La. 1975); State vs. O'Conner, 320 So.2d 188 (La. 1975); State vs. Frazier, 283 So.2d 261 (La. 1973); State vs. Willis, 262 La. 636, 264 So. 2d 590 (1972).

A trial judge's refusal to excuse a prospective juror for cause is not an abuse of his discretion, notwithstanding that the juror has voiced an opinion seemingly prejudicial to the

defense, where subsequently, on further inquiry or instruction, he has demonstrated a willingness and ability to decide the case impartially according to the law and the evidence. See State vs. Passman, 345 So.2d 874, 880 (1977) and cases cited therein.

When taken as a whole, Messers Peeples, Stacks, and Braddock's testimony on voir dire does not support defendant's contention that the judge's ruling constituted an abuse of discretion and reversible error.

STATE'S RESPONSE TO ISSUES NO. 5,6
RE: IN-COURT IDENTIFICATION

As the defense counsel so succinctly stated the Motion to Suppress issue in his brief (p. 36):

> "* * * The petitioner suggests to the Court that the sole basis for the arrest of the Defendant was the fact that the automobile had been stolen, coupled with the fact that he was at this moment with Ira Lee Lloyd, whose identification was found in said stolen vehicle..."

The State agrees. Upon coming upon the abandoned car in the ditch, coupled with the fact it had been stolen and the fact the only people nearby (Drew and Lloyd) responded as they did to initial investigatory stop, produced reasonable suspicion which ripened into probable cause when Lloyd identified himself as Lloyd -- tying in his wallet found in the car.

The State suggests the defendant's authorities, citing State vs. Saia, 302 So.2d 869 (1974) and similar cases are misplaced.

It is well recognized in the jurisprudence both Federal and State that a police officer may in certain circumstances approach a person for purposes of investigating possible criminal conduct and question the person so stopped to obtain his identity and his reasons for being where he is, even though there is no probable cause to make an arrest. Such a momentary detention does not constitute an arrest.

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, Terry recognizes that it may be the essence of good police work to adopt an intermediate response.
>
> "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information may be most reasonable in light of the facts known to the officer at the time."

Adams vs. Williams, 407 U.S. 143, 145, 146, 32 L.Ed.2d 612, 92 S.Ct. 1921 (1968); Terry vs. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). The police can detain and question the occupants of automobiles as well as pedestrians. Adams vs. Williams, supra. See also, Cady vs. Dombrowski, 413 U.S. 433 at 441, 37 L.Ed.2d 706 at 714, 715, 93 S.Ct. 2523 (1973).

> "As a result of our Federal system of government, however, State and local police officers, unlike Federal officers, have much more contact with vehicles for reasons related to the operation of vehicles themselves. All states require vehicles to be registered and operators to be licensed. States and localities have enacted extensive and detailed codes regulating the condition and manner in which motor vehicles may be operated on public streets and highways.
>
> "Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office. Some such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers, unlike Federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." (Emphasis added).

Louisiana has its own "stop and frisk" law, LSA-C.Cr. P. Art. 215.1 which provides:

> "A. A law enforcement officer may stop any person in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or a misdemeanor and may demand of him his name, address and an explanation of his actions.
>
> "B. When a law enforcement officer has stopped a person for questioning pursuant to this Article, and reasonably suspects that he is in danger of life or limb, he may search the outer clothing of such person for a dangerous weapon or for any other thing the possession of which may constitute a crime.
>
> "C. If the law enforcement officer finds a dangerous weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person."

In the present case, the police were clearly acting within the scope of their "caretaking" duties, Cady vs. Dombrowski, supra.

The right of a police officer to seize items inadvertently discovered in plain view is clearly recognized under both Louisiana and Federal jurisprudence. Coolidge vs. New Hampshire, 403 U.S. 443, 29 L.Ed.2d 564 (1971); Chimel vs. California, 395 U.S. 752, 23 L.Ed.2d 685, 89 S.Ct. 2034 (1969).

In State vs. Dixon, 337 So.2d 1165 (La. 1976), after an investigatory stop the police ordered the defendant out of his vehicle because they saw him move suspiciously as though reaching for a weapon. One of the officers opened the door and got the defendant out. Another officer in the doorway, glanced down and observed a plastic baggie where the defendant had been sitting. This was seized. The Louisiana Court upheld the search as one in which the officers seized items in plain view, seen inadvertently from a place where they had a right to be. State vs. Bourg, 332 So.2d 235 (La. 1976) and State vs. Jefferson, 284 So.2d 832 (La. 1973) are similar.

STATE'S RESPONSE TO ISSUE NO. 7
RE: COURTROOM IDENTIFICATION
OF DEFENDANT BY VICTIM.

At one point the defendant claims prejudicial error by virtue of the fact he was the only black sitting beside his white lawyer. He asserts this was a constitutional violation in and of itself. Clearly, this is not a violation of the privilege against self-incrimination. State vs. Junius, 242 So.2d 535 (1971) On the other hand, defendant contends the in-court identification by the victim was tainted by a suggestive line-up. However, defendant submits nothing but bold assertions, without more. Inasmuch as the allegedly "unduly suggestive" line-up is not supported by any evidence, there is no reason not to believe that the in-court identification was free of any taint itself (Vol. IV, page 45). Simmons vs. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968).

STATE'S RESPONSE TO ISSUE NO. 8
RE: LIE DETECTOR TEST

This Assignment of Error is actually moot. Despite the State's objection, the defense counsel did in fact get it in before the jury that the witness "offered to take any test to show that (he) (was) telling the truth."

"Q. Have you told any other story?

A. No.

Q. Have you offered to take any test to show that you were telling the truth?

Mr. Brown: I'm going to object to that, Your Honor.

By the Witness:

A. Yes, I did."

In any event, the jurisprudence of Louisiana has not yet admitted polygraph results into evidence. Compare State vs. Titus, ____So.2d ____(Docket No. 59,052 decided May 16, 1977).

In regard to the Sheriff seeking potential jurors from off the street, this issue has no merit.

STATE'S RESPONSE TO ISSUE
NO. 9 RE: JURY SELECTION

The Petitioner has grouped two distinct alleged errors: (1) that the jury was not selected from a valid cross section of the community, and (2) that the victim shouldn't have been allowed to testify to what happened to her at the hands of the Petitioner.

As to jury venire and its selection, this claim of racial discrimination in the selection of the petit jury venire should not be sustained in the absence of evidence as to the racial composition of the venire. State vs. Nix, 327 So.2d 301 (1976); State vs. LaRue, 324 So.2d 384 (1975); State vs. Gilmore, 323 So.2d 459 (1975). State vs. Watson, 301 So.2d 653 (1974).

For the foregoing reasons as set forth above and as spelled out in the decision at State vs. Drew, 360 So.2d 500 (see Appendix I), the State submits this Application for Writ should be dismissed.

Respectfully submitted,

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